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No. 97-795

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

THE PINAL CREEK GROUP, consisting of
CYPRUS MIAMI MINING CORPORATION,
INSPIRATION CONSOLIDATED COPPER COMPANY,
and BHP COPPER INC.,
Petitioners,

v.

NEWMONT MINING CORPORATION,
OCCIDENTAL PETROLEUM CORPORATION,
CANADIANOXY OFF-SHORE PRODUCTION COMPANY,
and ATLANTIC RICHFIELD COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENTS

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SUPPLEMENTAL BRIEF OF RESPONDENTS

On June 3, 1998, petitioners filed a "Supplemental Brief" to respond to the brief filed by the Solicitor General. Respondents question the propriety of petitioners' use of Rule 15.8 as a means to file yet another brief with this Court after the Solicitor General has responded to this Court's invitation to express his views in this case. The petitioners' Supplemental Brief does not concern "new cases, new legislation, or other intervening matter" as required by the Rule. Nevertheless, if petitioners' supplemental briefing is allowed, then respondents seek leave to file this response.

Petitioners concede that the Solicitor General was correct in noting "that there is no direct conflict among the circuit courts." Pet. Supp. Br. 2. However, petitioners assert that "a number of factors combine to render that consideration less significant" in this case. *Id.* The statements petitioners make to support that assertion are incorrect.

First, petitioners contend that "there is no dispute that the district courts are hopelessly divided, as several courts have expressly noted." Pet. Supp. Br. 2. Petitioners support this statement with a citation to three district court decisions that were decided between 1995 and early 1997. *Id.* (citing cases found in Pet. 8 n.4). Although, as respondents noted in their motion seeking interlocutory review (and several law review articles also observed), there used to be significant conflicts among the district courts, the state of the case law is now largely uniform. Most of the district court decisions allowing PRPs to assert joint-and-several claims—*including the three cases cited by petitioners*—have been reversed or overruled by the appellate courts in their respective circuits. *E.g., Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400 (D. Ariz. 1996), *rev'd,* 118 F.3d 1298 (CA9 1997); *Crofton Ventures Limited Partnership v. G & H Partnership,* No. MJG-96-1378, 1997 U.S. Dist. LEXIS 8067, at *8 (D. Md. Jan. 31, 1997) (allowing a PRP to assert joint and several claim) (overruled *sub. silentio* by *Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R. Co.*, —— F.3d ——, Nos. 97-1593, 97-1594 and 97-1599, 1998 WL 206116, at *4 (CA4 Apr. 29, 1998) (limiting PRPs to a contribution remedy); *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221 (E.D. Pa. 1995) (overruled *sub silentio* by *New Castle Co. v. Halliburton NUS Corp.*, 111 F.3d 1116 (CA3 1997)). All the circuit courts that have faced the issue (including the First, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits) have held that liable parties—and potentially liable parties that are not entirely in-

nocent as to the pollution at issue—can assert only a contribution claim againt other PRPs under CERCLA. As a result of the consensus among the circuit courts, at latest count, nearly thirty district court decisions—the vast majority—have arrived at the same conclusion, including virtually all the recently published decisions. *E.g., Kalamazoo River Study Group v. Rockwell Int'l*, 991 F. Supp. 890 (W.D. Mich. 1998); *Town of Oyster Bay v. Occidental Chem. Corp.*, 987 F. Supp. 182, 208-08 (E.D.N.Y. 1997); *Ninth Ave. Remedial Group v. Allis Chalmers Corp.*, 974 F. Supp. 684, 689 (N.D. Ind. 1997); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1263, 1266 n.2, 1269 (E.D. Cal. 1997); *Clear Lake Properties v. Rockwell Int'l Corp.*, 959 F. Supp. 763, 765 (S.D. Tex. 1997). At this point, the state of the law in the lower courts could hardly be more uniform.

Second, petitioners contend that the Solicitor General "surely goes too far in speaking of 'the uniformity among the courts of appeals.' " Pet. Supp. Br. 2 (citing SG Br. 7). The Ninth Circuit decided one issue, however, and one issue only: "whether [CERCLA] provides a party who is partly liable for the cleanup of a hazardous waste site with a claim against other potentially responsible parties ('PRPs') for joint and several recovery of the totality of its cleanup costs." Pet. App. 3. Like every other circuit court that has faced the issue, the Ninth Circuit answered that question "in the negative." *Id.* Petitioners contend that the difference in the reasoning of the circuit court opinions may lead to a conflict on several other issues such as (1) whether a "blameless" PRP may sue for joint and several liability, and (2) which statute of limitations applies to CERCLA contribution claims. Pet. Supp. Br. 3. As both the Ninth Circuit and the Solicitor General noted, these issues are entirely hypothetical on the record before the Court in this case because, among other things, petitioners are admittedly liable for the pollution at this Site, and no statute-of-limitations issue is implicated here. Pet. App. 14 n.5, 17; SG Br. 8 n.6, 9. Moreover, petitioners sidestep the fact that, in any event, these

tertiary issues are not worthy of certiorari at this time. *See, e.g., M&M Realty Co. v. Eberton Terminal Corp.*, 977 F. Supp. 683, 686 (M.D. Pa. 1997) (noting that every court that has considered the issue has concluded that a "blameless" landowner can sue for joint-and-several liability).

Third, petitioners contend that "although the United States may be content with the unsettled state of the law, the States and the cities are not, and have joined petitioners in urging this Court to grant review. Pet. Supp. Br. 4. In truth, despite petitioners' best efforts, only a handful of states and cities signed onto the *amicus* brief in support of their petition. As the Solicitor General noted, moreover, it is telling that even though the *amici* states urge the Court to read into CERCLA a joint-and-several remedy for policy reasons, none of these states have enacted laws within their own jurisdictions giving PRPs the right to sue other PRPs for joint-and-several liability. SG Br. 9. Indeed, the State of Arizona recently amended its state superfund statute to eliminate joint-and-several claims even by the state itself. Liability under Arizona's statute is now several only, Ariz. Rev. Stat. § 49-285(A) (1997), and the statute precludes Arizona's own enforcement agencies from using *CERCLA's* liability provisions to circumvent this several-only liability scheme, except under very narrow circumstances not applicable here. *Id.* at § 49-287(B).

Fourth, petitioners contend that the brief of the Solicitor General, which was requested by this Court, should be discounted because it represents the views of the United States, which is sometimes a CERCLA defendant. Pet. Supp. Br. 5-7. If such allegations merit any response at all, respondents note that the Solicitor General also represents the Environmental Protection Agency, the primary enforcer of CERCLA, whose lawyers were listed as "Of Counsel" on the brief the United States filed in the Ninth Circuit in this case.

Fifth, petitioners challenge the reasoning of the Solicitor General because he began his discussion with reference to "familiar general [common law] principles," rather than the "plain language" of CERCLA. Pet. Supp. Br. 7. As the Solicitor General correctly notes, "[p]etitioners' construction not only lacks a foundation in the 'plain language,' but it would lead to incongruous results." SG Br. 13. As numerous courts, including the Ninth Circuit below, have held, section 107(a) implies a cause of action in favor of liable private parties, but it simply does not define the nature of the remedy available to such parties. Pet. App. 8. Section 107(a) emphatically does not give liable private parties a claim for "joint and several liability." However, an "impressive collection of signposts," as the First Circuit described them in *United Tech. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 101 (CA1 1994), *cert. denied*, 513 U.S. 1183 (1995), including the text of section 113, the structure of the statute, the legislative history underlying the act, and the familiar common law principles incorporated into CERCLA, all demonstrate that claims by and between liable parties are by definition contribution claims, governed by the principles embodied in section 113 of the statute. Petitioners can ignore these signposts in their argument, but their refrain to the plain language of CERCLA is, as the Solicitor General has noted, "simply not accurate." SG Br. 13.

Sixth, petitioners contend that the Solicitor General has attempted to "muddy the waters" by making reference to a proposed consent decree between petitioners and the State of Arizona that has been filed in the same district court in which this case is pending. Pet. Supp. Br. 10. It is petitioners who are seeking to muddy the waters, however, by asking this Court to grant certiorari in this case even though its posture would change dramatically after the Court accepted review, if the decree were entered. The proposed decree, if approved, will indisputably implicate statutory provisions not currently at issue in this case.

The petition asks the Court to determine whether a liable or potentially liable party can assert joint-and-several claims under Section 107(a) of CERCLA against other PRPs. Pet. (i) (Question Presented). As such, the issue resolved by the Ninth Circuit and currently presented by the petition is whether the Pinal Creek Group has a claim for joint-and-several liability under section 107(a), or alternatively a claim for contribution under sections 107(a) and 113(f)(1).

Should the decree be entered, other sections of CERCLA, namely sections 113(f)(2) and (f)(3), will come into play. Section 113(f)(2) provides that a party who has settled with a state or the federal government "shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613 (f)(2). Section 113(f)(3)(B) provides, in turn, that a settling party "may seek contribution from any person who is not a party to the settlement referred to in paragraph [(f)](2)." Those provisions, which are not at issue at this point, will govern this case should the decree be entered.

Respectfully submitted,

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